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CLERK

IN THE

Supreme Court of the United States

October Term, 1982

SANFORD S. ZACK,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DAVID J. LIEBERMAN (P16662)
26555 Evergreen Road, Suite 1800
Southfield, Michigan 48076
(313) 355-0300

NANCY L. KAHN (P29907)
Levin, Levin, Garvett and Dill
3000 Town Center, Suite 1800
Southfield, Michigan 48076
(313) 352-8200

Attorneys for Petitioner

QUESTIONS PRESENTED

I

WHETHER, IN A TAX FRAUD CASE, THE COMMISSIONER OF INTERNAL REVENUE MAY MEET HIS BURDEN OF PROVING AN UNDERPAYMENT OF TAX BY RELYING ON THE COMMISSIONER'S NOTICE OF DEFICIENCY AND THE TAXPAYER'S FAILURE TO REBUT IT?

II

IN A TAX FRAUD CASE WHERE THE TAXPAYER HAS COME FORWARD WITH EVIDENCE OF CLOSELY RELATED EXPENSES WHICH OFFSET ALLEGED UNREPORTED ITEMS OF INCOME, IS THE BURDEN ON THE COMMISSIONER OF INTERNAL REVENUE TO PROVE THAT AT LEAST SOME UNREPORTED INCOME RESULTED FROM THE TRANSACTIONS IN QUESTION?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit, No. 82-1250, filed on October 29, 1982, will be reported in — F.2d — (1982). A copy of the Sixth Circuit's opinion is contained in the attached Appendix. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Sixth Circuit on December 27, 1982.

The opinion of the United States Tax Court in this case was reported as T.C. Memo 1981-700.

JURISDICTION

The judgment of the Court of Appeals was entered on October 29, 1982. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied by the Court of Appeals on December 27, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

The pertinent provision of 26 U.S.C. §7454(a), relating to the burden of proof in tax fraud cases, and 26 U.S.C. §6653(b), which contains the definition and elements of tax fraud, are set forth in the attached Appendix.

STATEMENT OF THE CASE

This case involves the imposition of the fraud penalty of §6653(b) of the Internal Revenue Code for the taxable years 1959, 1960, 1961, 1962, 1963, 1964 and 1965 on Petitioner, Sanford S. Zack. The trial of this case was before the Honorable Edna G. Parker in Detroit, Michigan on January 23, through January 27, 1978. On December 9, 1981, the Tax Court filed its Memorandum Findings of Fact and Opinion. (T.C. Memo 1981-700). The decision of the Tax Court was affirmed in a four (4) page Order by the United States Court of Appeals for the Sixth Circuit entered on October 29, 1982.

By stipulation of the parties the Statute of Limitations barred any tax deficiency claim by the Commissioner of Internal Revenue (hereinafter "The Commissioner") in this case absent a finding of fraud.

The Commissioner offered no evidence to prove an underpayment of tax by Petitioner Zack. The Commissioner claimed both at trial and on appeal that he is entitled to rely on his notice of deficiency to prove an underpayment of tax in a tax fraud case.¹ Petitioner Zack claimed both at trial and on appeal that the Commissioner could not rely on his notice of deficiency for this purpose in a tax fraud case.

Despite the fact that Petitioner Zack had no obligation to offer any explanation unless and until the Commissioner proved an underpayment of tax, Petitioner Zack did offer evidence to explain the alleged underpayments. Specifically, Petitioner Zack offered evidence to prove that he made debt consolidation advances to certain of his home improvement customers as a normal part of his home improvement business.² The repayment of these advances would explain the alleged underpayments.

Petitioner furnished the Commissioner with job records, summaries and explanations of the debt consolidation advances made to approximately 800 homeowners. By stipulation the parties agreed that

¹ Counsel for the Commissioner stated his position as follows:

"Now I am not attempting to prove the statutory notice. This is not my obligation. It is the Petitioner's obligation to show where, if at all, the statutory notice is incorrect because the statutory notice figures are totally independent from the issue of fraud. . . . I'm not attempting to prove that particular dollar amount. I'm attempting to prove that that dollar amount is reasonably calculated." (Transcript, pages 501-502).

² A debt consolidation advance is a cash advance made to a homeowner for the purpose of allowing the homeowner to pay off pre-existing debts with longer term home improvement financing. When the home improvement work is completed the advance is repaid from the proceeds of a home improvement loan. The repayment of the debt consolidation advance is not income, but merely repayment of a short term loan.

Petitioner Zack's records indicated that he made homeowner advances totaling \$392,066.00. The Petitioner sought to introduce the testimony of some of these homeowners regarding the advances. Instead, at the request of the Tax Court, this evidence was introduced through the testimony of the Commissioner's own revenue agent regarding his interviews with the homeowners. The homeowners corroborated Petitioner Zack's records.³

The legal rulings of the Tax Court and 6th Circuit Court of Appeals on which this Petition for Certiorari is based are as follows:

a. That the Commissioner could rely on his notice of deficiency and the taxpayer's failure to rebut it in proving the "underpayment of tax" element of tax fraud.

b. That despite the Tax Court's finding that some homeowner advances were made and that these advances would be related to and would offset gross receipts, the Court did not require the Commissioner to prove that some unreported income resulted from these transactions.⁴

³ At the request of Judge Faye in an attempt to limit the number of homeowner witnesses, the Commissioner was directed to conduct joint interviews of the proposed homeowner witnesses to ascertain the accuracy of Petitioner Zack's records. The Commissioner selected 30 recipients of debt consolidation advances to interview, none of whom denied receiving the rebates. (Transcript, page 55). The revenue agent conducting these interviews explained that he terminated the joint interviews after talking with 30 homeowner witnesses because all of the homeowners corroborated Petitioner Zack's records. (Transcript, pages 26-27).

⁴ The Tax Court acknowledged the rule of *Richardson v Commissioner*, 264 F.2d 400 (4th Cir 1959), *Valetti v Commissioner*, 260 F.2d 185 (3rd Cir. 1958) and *Perez v Commissioner*, T.C. Memo 1974-211, 33 T.C.M. 946 (1974) to the effect that when a taxpayer comes forward with evidence to show closely related off-setting deductions to alleged items of unreported income, the burden is on the Commissioner to show that some unreported income resulted from the transaction. The Tax Court refused to apply the rule, however. The Court of Appeals for the Sixth Circuit, without legal analysis, affirmed this ruling in an Order dated October 29, 1982.

REASONS FOR GRANTING THE WRIT

THE RULINGS OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT, AS OUTLINED ABOVE AND IN THE QUESTIONS PRESENTED, DIRECTLY CONFLICT WITH RULINGS ON THESE ISSUES BY OTHER CIRCUITS AND IN THE TAX COURT OF THE UNITED STATES.

Question I: WHETHER, IN A TAX FRAUD CASE, THE COMMISSIONER OF INTERNAL REVENUE MAY MEET HIS BURDEN OF PROVING AN UNDERPAYMENT OF TAX BY RELYING ON THE COMMISSIONER'S NOTICE OF DEFICIENCY AND THE TAXPAYER'S FAILURE TO REBUT IT?

By statute, the burden of proof in a tax fraud case is on the Commissioner. 26 U.S.C. §7454(a). The two elements of tax fraud are contained in 26 U.S.C. §6653(b), as follows: "1) (If) any part of any *underpayment . . . of tax* required to be shown on a return (2) is due to *fraud . . .*" (Emphasis and enumeration added).

The statutory placement of the burden of proof in a tax fraud case upon the Commissioner requires that the Commissioner prove an underpayment of tax, the first element in a tax fraud case. However, the ruling of the Sixth Circuit in the instant case permits the Commissioner to meet his burden of proving an "underpayment of tax" by using an extrajudicial statement, his notice of deficiency, and the taxpayer's failure to rebut it. This is equivalent to shifting the burden of proof to the taxpayer. The Sixth Circuit's decision is in *direct conflict* with the rulings of several other circuits and the Tax Court of the United States on this issue.

The First Circuit made a clear and concise ruling on this point in *George v Commissioner*, 338 F.2d 221, 223 (1st Cir. 1964):

"Since the burden was on the Commissioner to prove fraud, it must follow that he had the burden of proving every subsidiary fact relied on by the Court to support that ultimate conclusion. To permit, in satisfying this burden, the use of a Commissioner's finding that was to be accepted only because the taxpayer had failed to meet a burden of overcoming it, would be to allow the Commissioner to raise himself by his own bootstraps. *Goldberg v Commissioner*, 5 Cir., 1956, 239 F.2d 316; *Olinger v Commissioner*, 5 Cir., 1956, 234 F.2d 823; cf. *Valetti v Commissioner*, 3 Cir., 1958, 260 F.2d 185, 188."

The decision of the First Circuit in *George v Commissioner*, *supra*, followed similar holdings by the Fifth Circuit. See, *Goldberg v Commissioner*, 239 F.2d 316 (5th Cir. 1956) and *Olinger v Commissioner*, 234 F.2d 823 (5th Cir. 1956), as cited above.

The same conclusion has clearly and consistently been reached by the United States Tax Court when addressing this issue. For example, in the case of *Paul M. Hansen v Commissioner*, T.C. Memo 1981-98; 41 T.C.M. 1023, 1035 (1981), the Court, citing considerable previous authority, ruled as follows:

". . . (I)n establishing that there is a deficiency or underpayment in tax where the statute bars the deficiency absent fraud, (the Commissioner) cannot rely on the presumption of correctness of his determination to support any item necessary to show some deficiency but must establish these items by evidence."

This conclusion was described as well-settled in the case of *Robert Fulp v Commissioner*, T.C. Memo 1978-382; 37 T.C.M. 1567, 1568 (1978):

"It is also well-settled that in a fraud case, the Commissioner cannot establish *any of the essential elements of fraud* by relying on his notice of deficiency and the Petitioner's failure to disprove it." (Citations omitted) (Emphasis supplied)

The authority holding that the Commissioner may not, in a tax fraud case, meet his burden of proving an underpayment of tax by relying on his notice of deficiency is not new. In *C.A. Reis v Commissioner*, 1 T.C. 9, 13 (1942) the Court analyzed the placement of the burden of proof on the underpayment of tax issue in a tax fraud case as follows:

"We are unable to conceive that the presumption of correctness of a deficiency notice, which in the ordinary case the (taxpayer) must meet, was intended by Congress to be used as a substitute for evidence in a case where the (Commissioner) has the burden of proof as he has under the various cases first above-cited. To adopt a classic to the case, the deficiency notice is a shield, not a sword. It is a defense where the (taxpayer) has the onus of proof, not a weapon where the (Commissioner) has the burden."

The opinion of the Sixth Circuit in the instant case directly conflicts with the cases reviewed above. It does so without even recognizing the fundamental issue in question. Accordingly, there is no discussion of authorities, and no attempt to distinguish or overrule the above cited cases.

There is no dispute that the burden is on the Commissioner to prove fraud and that he has the burden of proving every subsidiary element required by the fraud statute. The Sixth Circuit, however, in *direct conflict* with the holding in *George v Commissioner, supra*, as quoted on page 6 of this Petition, has permitted the Commissioner to "satisfy this burden (by) the use of a Commissioner's finding that was to be accepted only because the taxpayer had failed to meet a burden of overcoming it. . ." Thus, the Sixth Circuit allowed the Commissioner to "raise himself by his own bootstraps," contrary to the holding in *George v Commissioner, supra*.

By requiring the taxpayer to rebut the Commissioner's notice of deficiency, in essence the Sixth Circuit has placed the burden of disproving the underpayment element of fraud on the taxpayer.⁵ The court reaches this decision without acknowledging that it is setting forth a new rule of law; nor does it set forth any compelling reasons for disregarding a fundamental principle of income taxation. It neither distinguishes nor overrules the decisions of the First and Fifth Circuits. Instead, it inadvertently creates a split of authority between Circuits.

⁵ The analysis of the Sixth Circuit was as follows:

"(F)irst in his efforts to collect back taxes from Zack, the Commissioner produced a deficiency calculation. Zack failed to overcome the presumption that this assessment was accurate. At this point Zack owed the government back taxes in an amount determined without reference to the §6653 (b) fraud penalty. Second, in order to obtain a fraud penalty in addition to back taxes, the government assumed the burden of demonstrating that Zack acted with fraudulent intent when he misstated his income for the years in question."

Order of the Sixth Circuit Court of Appeals dated 10/29/82, page 3.

Petitioner Zack respectfully submits that Certiorari should be granted as to the Sixth Circuit's opinion in this case in order to address the split of authority which this decision creates and in order to correct the effect of the Sixth Circuit's holding in placing the burden of proof of an underpayment of tax on the taxpayer contrary to 26 U.S.C. §7454(a).

Question II: IN A TAX FRAUD CASE WHERE THE TAX-PAYER HAS COME FORWARD WITH EVIDENCE OF CLOSELY RELATED EXPENSES WHICH OFFSET ALLEGED UNREPORTED ITEMS OF INCOME, IS THE BURDEN ON THE COMMISSIONER OF INTERNAL REVENUE TO PROVE THAT AT LEAST SOME UNREPORTED INCOME RESULTED FROM THE TRANSACTIONS IN QUESTION?

In this case the Commissioner offered no evidence of an underpayment of tax but instead sought to rely on his notice of deficiency. Despite the fact that Petitioner Zack had no obligation to come forward with an explanation absent proof of an underpayment of tax, Petitioner Zack did offer proof that unexplained bank deposits were the repayment of debt consolidation advances made to his home improvement customers. The business records of Petitioner Zack were offered as evidence on this point. Zack's business records were corroborated by the results of jointly conducted interviews of Zack's homeowner customers made at the request of the Court, along with testimony of Revenue Agent Miller to the effect that the joint interviews supported the records and testimony of Petitioner Zack.

Two Circuits and the Tax Court of the United States have ruled that when a taxpayer comes forward with evidence of closely related deductions the burden is on

the Commissioner to prove that at least some unreported income resulted from the transactions in question. As stated in *Richardson v Commissioner*, 264 F.2d 400, 405 (4th Cir. 1959), "in order for a fraud penalty to be assessed where the unreported items of income and expenses are closely related, the Commissioner must prove that at least some unreported net income resulted from the unrecorded transactions."

The facts in the *Richardson* case bear some similarity to the facts in the instant case. In *Richardson* the taxpayer claimed that it was general practice for Chandlers in large coastal ports of the United States to give captains or masters of foreign flagships a commission on their orders. In *Richardson* the taxpayer offered evidence that the alleged unreported items of income were offset by closely related expenses, specifically commissions to ship captains. The Commissioner failed to prove that at least some unreported net income resulted from these transactions. The Court ruled, through reference to a related case, *Valetti v Commissioner*, 260 F.2d 185 (3rd Cir. 1958), that the Commissioner disregarded the most obvious source of direct evidence, namely the claimed payees of these commissions, and instead sought to rest his case upon inference, which resulted in the failure to prove his case by clear and convincing evidence. See *Valetti v Commissioner*, *supra*, 260 F.2d at 189; *Richardson v Commissioner*, *supra*, 264 F.2d at 405. A similar holding was reached in the case of *Perez v Commissioner*, T.C. Memo 1974-211, 33 T.C.M. 946, 952 (1974).

These holdings are consistent with the ruling of this Court in the case of *Holland v United States*, 348 U.S. 121; 99 L. Ed. 150; 75 S. Ct. 127 (1955) wherein the Court held in an analogous case of criminal prosecution for evasion of

federal income tax, that the government's proof depended upon its effective negation of reasonable explanations by the taxpayer inconsistent with guilt. The Court ruled that such "refutation might fail when the government does not track down relevant leads furnished by the taxpayer — leads reasonably susceptible of being checked, which, if true would establish the taxpayer's innocence." 348 U.S. at 135-136.

In this case, however, the Court refused to either require the Commissioner to negate the reasonable explanation offered by the taxpayer, *Holland v United States, supra*, or to prove that at least some unexplained income resulted from the transactions in question, *Richardson v Commissioner, supra*. The Tax Court expressly found that some advances were made and that these would offset alleged unexplained income. (Opinion p. 49). The cases cited above require that, upon such a finding, the Commissioner must prove by clear and convincing evidence that some unreported income resulted from these transactions. The Tax Court refused to place such a burden on the Commissioner. The Sixth Circuit also ignored the rule of law set forth in *Richardson v Commissioner, supra*, without comment or analysis.⁶

Even a cursory review of the record in this case discloses that if the rules set forth in *Richardson v Commissioner, supra*, and *Holland v United States, supra*, had been applied in this case a decision for the taxpayer would have been mandatory because the *only* evidence

⁶ Specifically the Court ruled as follows on page two of its opinion: "On appeal, Zack argues that in this *fraud* case the burden was on the Commissioner to show that Zack had not in fact rebated a portion of the loan proceeds to his customers. Under this theory, the Commissioner's failure to do so entitled Zack to credit for the rebate deductions. We disagree." (Emphasis in original).

offered by the Commissioner regarding the debt consolidation advances corroborated Petitioner Zack's records. Unlike the circumstances in *Richardson v Commissioner, supra*, where there had been a failure to investigate the explanation of the taxpayer, the Court here ordered joint interviews with the recipients of the debt consolidation advances. When these interviews corroborated Petitioner Zack's records, however, the Court disregarded them. There was no other evidence offered by the Commissioner relating to the homeowner advances, therefore there was no evidence offered by the Commissioner to prove that income resulted from these transactions.

The Commissioner not only failed to meet the burden of proof which should have been required under the ruling in *Richardson v Commissioner, supra*, the Commissioner failed to offer any evidence which disputed Petitioner Zack's explanation of the events or any evidence that income resulted from the transactions in question. The Sixth Circuit circumvented these facts by placing the burden of proof on Petitioner Zack.

The result of this ruling is a total subversion of the statutory placement of the burden of proof upon the Commissioner. The Sixth Circuit's ruling on this point, made without comment or analysis (See Note 6), demonstrates once again that the Sixth Circuit may have reached its decision without analyzing the legal issue. Its decision neither distinguishes nor overrules the decisions of the Third and Fourth Circuits cited above. Instead, it inadvertently creates another split of authority between the Circuits.

Accordingly, Petitioner Zack respectfully requests this Court to grant this Petition in order to address the split of authority which this decision creates in refusing to follow the rule in *Richardson v Commissioner, supra*, which holds that when a taxpayer introduces evidence of items which offset alleged unreported income, the burden is on the Commissioner to prove that at least some unreported income resulted.

CONCLUSION

A long history of statutes and case law indicates that the fraud penalty in a tax case is not to be taken lightly. By statute the burden is on the Commissioner to prove all elements of fraud by clear and convincing evidence. Petitioner Zack submits that the decision of the Sixth Circuit in this case contravenes this placement of the burden of proof in several respects and creates splits of authority between the Circuits in at least two different areas.

In this case the Commissioner claimed that he was not required to submit any proof with regard to underpayment of tax but could rely simply on his notice of deficiency. The Sixth Circuit, in supporting the Commissioner's position, creates a ruling which directly conflicts with decisions of the First and Fifth Circuits and the Tax Court of the United States' holding that the Commissioner may not rely upon a notice of deficiency in a tax fraud case. The decision of the Sixth Circuit on this issue subverts the protection for taxpayers written into the law by the burden of proof in tax fraud cases.

The second split of authority created by the Sixth Circuit is by the Court's refusal to apply the rule in *Richardson v Commissioner, supra*, and *Valetti v Commissioner, supra*. Under *Richardson, supra*, once the taxpayer has come forward with proof of closely related expenses which would offset alleged items of unreported income, the burden is on the Commissioner to prove that some unreported income resulted from the transactions in question. The refusal of the Sixth Circuit to apply this rule without comment or analysis again creates a split of authority and circumvents the statutory placement of the burden of proof in tax fraud cases on the government by clear and convincing evidence.

Perhaps even more significantly, the decision of the Sixth Circuit provides a false signal to the Commissioner that he can use the fraud penalty without concern for the burden of proof. If this decision is allowed to stand, taxpayers within the Sixth Circuit can be subjected to civil fraud cases by the Commissioner, even though the Commissioner can produce no evidence regarding an underpayment of tax and no evidence to rebut a reasonable explanation offered by the taxpayer. In the Sixth Circuit, the burden will now be on the taxpayer to disprove any conclusory assertion of underpayment by the Commissioner. This false signal as to the burden of proof should be corrected before the Courts are inundated by a flood of fraud cases for which the Commissioner has no substantiating evidence regarding an underpayment of tax.

This Court should grant Certiorari as to this matter in order to prevent a total subversion of the statutory burden of proof in tax fraud cases and in order to clear up the confusion and splits in authority which the Sixth Circuit has created by refusing to follow the rules of law set forth by other Circuits in these two areas.

Respectfully submitted,

By /s/ DAVID J. LIEBERMAN (P16662)
Attorney for Petitioner
26555 Evergreen Road, Suite 1800
Southfield, MI 48076
(313) 355-0300

NANCY L. KAHN (P29907)
Levin, Levin, Garvett and Dill
Attorneys for Petitioner
3000 Town Center, Suite 1800
Southfield, MI 48076
(313) 352-8200

Dated: February 3, 1983

APPENDIX "A"

INTERNAL REVENUE CODE OF 1954:

SEC 7454(a):

"Fraud. — In any proceeding involving the issue whether the petitioner has been guilty of fraud with intent to evade tax, the burden of proof in respect of such issue shall be upon the Secretary."

APPENDIX "B"

INTERNAL REVENUE CODE OF 1954:

SEC 6653(b):

"Fraud. — *If any part of any underpayment* (as defined in subsection (c)) of tax required to be shown on a return *is due to fraud*, there shall be added to the tax an amount equal to 50 percent of the underpayment. In the case of income taxes and gift taxes, this amount shall be in lieu of any amount determined under subsection (a). In the case of a joint return under section 6013, this subsection shall not apply with respect to the tax of a spouse unless some part of the underpayment is due to the fraud of such spouse."

APPENDIX "C"

OPINION

(United States Court of Appeals
For the Sixth Circuit)

(Filed October 29, 1982)

(Sanford S. Zack, Petitioner-Appellant v. Commissioner of Internal Revenue, Respondent-Appellee — No. 82-1250)

BEFORE: Martin, Circuit Judge; Brown, Senior Circuit Judge; and Bertelsman, District Judge.*

Sanford S. Zack seeks review of a Tax Court judgment** upholding tax deficiencies and fraud penalties assessed by the IRS. Specifically, Zack claims that the Tax Court misallocated the burden of proof by requiring the taxpayer to prove that he actually paid certain deductible expenses.

The facts of this case are fully set out in the Tax Court's opinion and the briefs of the parties. Inasmuch as those facts are not in dispute on appeal, we proceed directly to the legal issue.

This controversy centers around the tax consequences of Zack's illegal use of FHA home improvement loans. For purposes of this civil proceeding, Zack admits that he understated his income by an amount which corresponds to the difference between the total loan proceeds and the actual cost of the home repairs he performed. Zack contends, however, that this undeclared income was wholly offset by unclaimed deductions which took the form of "rebates" to his customers.

* Honorable William O. Bertelsman, United States District Judge for the Eastern District of Kentucky, sitting by designation.

** T.C. Memo 1981-700.

The IRS investigated these alleged deductible expenses by interviewing a number of Zack's customers. Initially, most of the customers denied having received "rebates;" later, when questioned again in Zack's presence, the same customers tended to corroborate Zack's version of the "facts."

In determining the amount of Zack's tax deficiency, the Commissioner charged him with the unreported portions of the loan proceeds. However, in view of the highly suspect nature of the customers' "testimony," the Commissioner refused to credit Zack with the alleged corresponding deductions.

The Tax Court accepted the Commissioner's calculation of deficiencies and held that the government had succeeded in proving fraud on Zack's part.

On appeal, Zack argues that in this *fraud* case the burden was on the Commissioner to show that Zack had not in fact rebated a portion of the loan proceeds to his customers. Under this theory, the Commissioner's failure to do so entitles Zack to credit for the rebate deductions. We disagree.

Zack confuses two distinct burden of proof requirements. He asserts, correctly, that the Commissioner bears the burden of proof on the issue of *fraud*. The Commissioner must produce "clear and convincing" evidence of the taxpayer's fraudulent intent. 26 U.S.C. § 7454(a). However, Zack is incorrect in his apparent assumption that the Commissioner must also prove the accuracy of his deficiency assessment. On the contrary, the Commissioner's determination of tax liability is presumptively correct; the taxpayer bears

the burden of demonstrating error in the calculation. *Helvering v Taylor*, 293 U.S. 515 (1935); *Coomes v Commissioner*, 572 F.2d 554 (6th Cir. 1978). This presumption of accuracy does not change merely because the case requires a subsidiary inquiry into the question of fraud. *Drieborg v Commissioner*, 225 F.2d 216, 218 (6th Cir. 1955).

In our opinion, the present case should be analyzed as follows: first, in his effort to collect back taxes from Zack, the Commissioner produced a deficiency calculation. Zack failed to overcome the presumption that this assessment was accurate. At this point, Zack owed the government back taxes in an amount determined without reference to the section 6653(b) fraud penalty. Second, in order to obtain a fraud penalty in addition to back taxes, the government assumed the burden of demonstrating that Zack acted with fraudulent intent when he misstated his income for the years in question. That the Commissioner succeeded in sustaining its burden is beyond peradventure; Zack's course of conduct was replete with "badges of fraud." *Id.* at 219.

Zack's other arguments, pertaining to the statute of limitations and certain evidentiary rulings below, are equally without merit.

The judgment of the Tax Court is affirmed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk